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Supreme Court of the United States

OCTOBER TERM, 1968

No. 740

STANDARD FRUIT AND STEAMSHIP COMPANY,
Appellant

versus

UNITED FRUIT COMPANY
and
UNITED STATES OF AMERICA,
Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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BRIEF OPPOSING UNITED FRUIT COMPANY'S MOTION TO DISMISS OR AFFIRM

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I

United Fruit Company has moved to dismiss the appeal on the ground that the order appealed from is not final but interlocutory, since it "was expressly made without prejudice to renewal of the motion thereafter".

This contention confuses finality with *res judicata*. This Court has held expressly that an order or judgment which denies the relief sought is final for purposes of appeal, even though it does not bar a renewed application for the same relief. *Wilson vs. Republic Iron Co.*, 257 US 92 (1921). Accord: *W. E. Hedger Transportation Corp. vs Ira S. Bushey & Sons*, 155 F2d 321 (CA 2-1946), cert. den., 329 US 735.

More fundamentally, the mere fact that appellant may renew its motion at a later date under changed circumstances—a right which required no reservation by the District Court—by no means guarantees that the same relief now sought will then be available.

This Court has held that the question of finality is essentially a pragmatic one looking to achievement of the "just, speedy, and inexpensive determination of every action", and that a consideration of the effects of delay and changing conditions on the rights of the parties and the public interest may be determinative. *Brown Shoe Co. vs United States*, 370 US 294, 306, 311 (1962).

Information which might at this time be invaluable to appellant in the protection of its own rights, and to the public interest in the informed implementation of consent decrees in light of the effect thereof on the defendant's industry and competitors, may be cold comfort to both if delayed until after the pattern of implementation has become fixed and irreversible.

Further, while United would make much of appellant's right to renew its motion "either at the time of the approval of the detailed program (to be filed in 1969) or at the time that the final step of divestiture is submitted to the court" (motion, p. 4), the fact is that since all these matters are secret and closed to appellant and the public, appellant has no way of knowing when any of them takes place. Nor has there been the slightest indication that the District Court would be any better disposed to grant appellant's motion after United's second detailed pro-

gram is filed in 1969 than it was after the first was filed in 1968.

II

United's motion to affirm is based on the asserted "inherent authority of the District Court" to close the record, which is stated to be (a) established by decisions cited in United's brief in opposition to mandamus, and (b) not seriously contested by appellant.

In fact, appellant's jurisdictional statement points out (footnote 1, p. 8) that the decisions cited by United involved discovery material covered by Rule 30b, FRCP, or related affidavits ordered sealed temporarily pending a hearing; and that none furnishes any authority for closure of the record of compliance with an antitrust decree.

The jurisdictional statement also points out (pp. 9, 17-18) that such a closure order is directly contrary to repeated Congressional admonitions that public antitrust cases are to be conducted in public view and not behind closed doors, and that open antitrust proceedings are particularly important when a consent decree is involved, to assure that the decree really serves the public interest, and is not merely a convenient vehicle for disposition of litigation on a volume basis.

United's statements that appellant has "sought by general and abstract appeals to the public interest to obtain information to be used to promote its private ends", and

that "the United States is in a better position than Standard to determine whether it requires assistance from Standard to carry out the purposes of the (consent) judgment" (motion, p. 7), are beside the point.

Appellant has never made any secret of its self-interested motivation in this matter. But both Congress and this Court have recognized the essentiality of such motivation on the part of interested private parties, to proper enforcement of the antitrust laws for the public benefit.

While the Government has, on this appeal, receded from its position below advocating the relief which appellant seeks, this cannot be considered conclusive of the question, since the whole purpose of Congress' open-proceedings rule, and of the statutory and judicial emphasis on the effectiveness of private interests in this field, is to make sure that the Government's enforcement function is being discharged properly.

Conclusion

This Court's decision in *Ex parte Uppercu,* 239 US. 435 (1915), evidences the gravity of a record-closure order in any judicial proceeding, contrary as such an order is to the ancient Anglo-American repugnance—enshrined constitutionally as to federal criminal proceedings in this country—toward secret trials.

Repeated, explicit expressions of Congressional repugnance for secrecy of any form in antitrust cases, at-

test the special significance of the questions raised by the closure order in the case at bar.

It is again respectfully submitted that the order appealed from is, especially under the pragmatic test endorsed by this Court, final, not interlocutory, for the purpose of this appeal; and that the questions presented by the appeal are of such substance and public moment as to justify plenary consideration, rather than disposition on motion papers.

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